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No. 89-1215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,

Petitioners,

VS.

JOHNSON CONTROLS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE NATIONAL SAFE WORKPLACE INSTITUTE AS AMICUS CURIAE SUPPORTING RESPONDENT

JAMES D. HOLZHAUER
Counsel of Record
DANUTA BEMBENISTA PANICH
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Attorneys for Amicus Curiae

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTIONS PRESENTED

1. Where an employer policy excluding all fertile women from certain jobs because of concerns for the health of any fetus that those women may conceive is challenged as unlawful gender discrimination violative of Title VII of the Civil Rights Act of 1964:

a. does the plaintiff or the defendant bear the burden of proving that the employer's justification for excluding women from certain jobs meets Title VII standards?

b. is that justification judged under the explicit provisions of the statutory affirmative defense for bona fide occupational qualifications or is the employer entitled to assert an additional, broader "legitimate business justification" defense not explicitly stated in the statute?

c. if only the statutory bona fide occupational qualification defense is available, does a fetal protection purpose come within the bounds of that defense?

2. Are scientific animal studies insufficient as a matter of law to demonstrate a significant risk to humans due to the exposure to a toxic substance?

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STATUTES:

Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*	*passim*
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*	*passim*

MISCELLANEOUS:

N. Ashford, *Crisis In The Workplace* (1976) ... 15

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M. Green & N. Waitzman, *Business War On The Law* 14-16 (1981) 14, 15

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D. Nelkin & M. Brown, *Workers At Risk* 149-162 (1984) 14

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BRIEF FOR THE NATIONAL SAFE WORKPLACE INSTITUTE AS AMICUS CURIAE SUPPORTING RESPONDENT

The National Safe Workplace Institute respectfully submits this brief as amicus curiae in support of the respondent.[1]

INTEREST OF THE AMICUS CURIAE

The National Safe Workplace Institute (the "Institute") is a national, not-for-profit research and education organization devoted to issues of workplace safety and health.

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[1] The written consent of each of the parties to the filing of this brief has been filed with the Clerk.

The Institute has prepared and published research and reports on a variety of workplace safety issues, investigated and intervened in workplace safety disputes, provided expert testimony to congressional hearings, acted as an international clearinghouse for information on job safety issues, and encouraged corporate and government entities to be fully accountable for workplace safety and to adopt and require safe work practices.

The Institute's work has been widely recognized as effective and important. Gerald Scannell, the Administrator of OSHA, has referred to the Institute as "the social conscience of the nation on job safety issues." William E. Brock, assessing the impact of his tenure as Secretary of Labor, said that "[a]ny accomplishments we made to improve workplace safety were due in large measure to [the Institute]." ABC News characterized the Institute as "the most effective and independent organization on worker safety issues in the U.S." As a result of its efforts, the Institute has received the J. William Lloyd, MD, Award from the United Steelworkers of America, the William Steiger Memorial Award from the American Conference of Industrial Hygiene, and a special service award from the *Engineering News-Record.*

The Institute's research and advocacy has included substantial work in the area of fetal protection policies. Two of the Institute's directors recently appeared on the MacNeil-Lehrer News Hour's program on the Johnson Controls case. The Institute strongly supports equal opportunity for women. It agrees with petitioners and their amici that fetal protection policies may be used as a pretext for sex discrimination and it condemns such discrimination. But it also acknowledges that some fetal protection policies are not grounded in discrimination. The Institute believes that an open-minded investigator would be compelled to acknowledge that current medical research indicates that certain toxins in the workplace—especially lead—appear to directly damage developing fetuses in utero. That damage is different in kind and degree (and apparently occurs at much lower exposure levels) than any direct harm, reproductive or otherwise, to women and men who are exposed to the toxins. To the degree that such medical evidence merely reflects research bias, it should be condemned and ignored. But to the extent that it reflects the fact that fetuses only develop in utero in women, it must be heeded.

Much of the Institute's work involves trying to increase corporate accountability for workplace safety and health. To hold employers accountable, they must be given discretion to respond to health and safety hazards. That should be true whether the hazards are to employees, customers, bystanders, or children. This Court should not interpret Title VII or the Pregnancy Discrimination Act in such a way as to undermine the equally important interests served by the Occupational Safety and Health Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

At bottom, petitioners' position is clear and simple: they claim that Title VII and the Pregnancy Discrimination Act prohibit employers from excluding women—even pregnant women—from jobs that pose a substantial risk to the developing fetus. In their view, Title VII requires employers to allow women to balance the health risks to unborn children against the benefits of the particular job.[2] As the

[2] Petitioners' interpretation of Title VII would preclude *any* differential treatment of women that an employer might propose to deal with fetal risks. Thus, if sound medical judgment warranted use of respirators or other protective devices by women only, an employer policy requiring that use would be deemed unlawful.

amicus brief for the American Civil Liberties Union and others points out, the choice may very well be between an uncertain risk of injury to unborn and perhaps uncontemplated children on the one hand, and a substantial reduction in income, economic well-being, and possibly even health (due to loss of health insurance) on the other.

Respondent, while not disputing the fact that substantial competing interests are at stake, disagrees that the choice must be left to the employee. It argues that under narrow circumstances—where workplace exposure results in a demonstrable and substantial fetal risk and no reasonable alternatives exist—an employer should be permitted to exclude women capable of bearing children from jobs involving exposure to those toxins.

This Court is asked to choose between those alternative interpretations of federal law, a difficult task from the standpoint of both public policy and statutory interpretation. That task is not made any easier by arguments that ignore relevant differences between the reproductive functions of men and women, that claim that the tragic effects of lead exposure on developing children are really not that bad, or that assert that Johnson Controls should "simply" eliminate the problem by perfecting a lead-free battery. Although lead exposure at some levels might very well damage both sperm and ovum, and thus cause infertility and perhaps birth defects, the biological fact that fetuses develop only in women means that there is another, qualitatively different opportunity for fetal injury when pregnant women are exposed to toxins such as lead. The brain and nervous system develop in utero, in women. In young children and developing fetuses, the brain and nervous system are especially vulnerable to the effects of lead. Johnson Controls' policy is intended to protect children from the serious effects of direct exposure to lead in utero.

Thus, the difficult choice required by this case is a real one. The question, as petitioners imply, is one of who should make that choice. Does Title VII, and sound public policy, require that the choice be left to the individual employees? Or does federal law permit—or perhaps require—employers to make that choice for them? The National Safe Workplace Institute believes that employers must be held *fully* accountable for workplace injuries and illnesses and thus must be given discretion to make safety and health decisions, even when those choices are contrary to the economic interests of employees. That philosophy is embodied in the Occupational Safety and Health Act. Employers in this country are *not* free to offer high wages in return for increased health and safety risks. Employees are *not* free to accept an unsafe workplace in return for the higher wages employers might be willing to pay to avoid the cost of safety. For good reason, federal policy does not leave these choices to the workers.

Federal statutes should be interpreted, whenever possible, harmoniously. In light of the requirements and the underlying policy of the Occupational Safety and Health Act, it would be disharmonious in the extreme to interpret the bona fide occupational qualification exception—and the concept of "normal operation" of a business—to exclude concerns over safety and health. Under petitioners' interpretation, in assessing what is "reasonably necessary to the normal operation of [its] business," an employer can only take into account what is necessary to get the job done, and not any impact the job might have on the health or safety of the employee or others. But to ignore health and safety risks is distinctly *abnormal* and contrary to federal policy. Neither the language nor the intent of Title VII requires such an interpretation.

The Institute believes that in the rare case where exposure to toxins in the workplace results in a significant health risk only to women—or only to men, or only to members of some other group—and no reasonable alternatives exist, employers should be permitted to exclude members of the affected group from jobs where such exposure is inevitable. This appears to be such a rare case.

ARGUMENT

I. The "Business Necessity" Test Applied By The Courts Below Is Inapplicable.

Following the lead of the Fourth, Fifth and Eleventh Circuits,[3] both the district court and the court of appeals held that Johnson Controls' fetal protection policy should be evaluated under the "business necessity" test or defense.[4] But the business necessity test—as to which the burden of proof is on the plaintiffs—was never intended to apply to facially discriminatory employment practices. This Court has consistently applied the business necessity test only to cases involving facially neutral employment practices that have a disparate impact on particular groups. See, *e.g.*, *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989), *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and intervening disparate impact cases.

[3] *Wright* v. *Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982); *Zuniga* v. *Kleberg County Hospital*, 692 F.2d 986 (5th Cir. 1982); *Hayes* v. *Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984).

[4] The district court characterized business necessity as a "defense," which Johnson Controls would have to prove. Pet. App. 117a. After it reached that conclusion, this Court decided *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989), which made it clear that business necessity is part of the test for discrimination, and that plaintiffs bear the burden of proof on this issue. The court of appeals therefore held that the UAW had the burden of proving that the Johnson Controls policy was not justified by business necessity. Pet. App. 29a-30a.

The court of appeals reasoned that the framework used by this Court for evaluating disparate treatment cases "was not intended to be an inflexible rule" (Pet. App. 21a) and that fetal protection policies should be analyzed under the business necessity test because they "involve[ ] motivations and consequences most closely resembling a disparate impact case." *Id.* at 23a. But the consequence of the fetal protection policy—exclusion of nearly all women from certain jobs—even more closely resembles the consequence of disparate treatment, and benign motivation has never been thought to justify a reduced level of scrutiny in cases of clear discrimination. Thus, in *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), this Court declined to find that the employer's practice of requiring women to make larger pension fund contributions was justified by the fact that women, as a class, live longer than men. The employer argued that pension benefits were more costly for women than for men—the kind of motivation that might be accepted in a disparate impact case. But the Court held that such a motivation could not save a facially discriminatory policy.[5]

[5] The issue in *Manhart* was whether the employer's policy was facially discriminatory. The employer argued that it was not, because women lived longer than men and the cost (and value) of their pension benefits was thus greater. For present purposes, it is important that the Court did not apply business necessity analysis on the ground that the economic motivation for the policy more closely resembled that of a disparate impact case. Instead, it applied disparate treatment analysis. *Manhart* did not involve exclusion of women from jobs and thus was not (and could not be) evaluated under the bona fide occupational qualification exception.

The differences in analysis required for disparate impact and disparate treatment claims is perhaps best seen in *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977). The Alabama Board of Corrections required that applicants for prison guard positions meet certain minimum height and weight requirements and also prohibited women from working in "contact positions" in maximum security prisons for men. This Court applied the business necessity test to the former requirement, which was facially neutral but had a disparate impact on women. But it held that the latter requirement—which was facially discriminatory—could be justified, if at all, only under the bona fide occupational qualification exception applicable to disparate treatment cases. The motivation for both parts of the Alabama rule was the same: a belief that only burly individuals—and in some cases, only burly men—could handle potentially violent and abusive prison behavior. But the required analysis was different because one claim alleged disparate impact and the other disparate treatment.

It would be particularly inappropriate to apply business necessity analysis to facially discriminatory employment practices following this Court's decision in *Wards Cove*. There, the Court explained that the burden of proving that an employment practice was not justified by business necessity "must remain with the plaintiff, for it is he who must prove it was 'because of such individual's race, color, [sex],' etc., that he was denied employment opportunity." 109 S. Ct. at 2126. The rule placing the business necessity burden on the plaintiff "conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on legitimate *neutral* considerations." *Ibid.* (emphasis added).

But in a disparate treatment case, once the plaintiff proves that the employer's action "was [*not*] based solely on legitimate neutral considerations," the plaintiff has fulfilled his burden and has proven that the action was "because of such individual's * * * sex." At that point, the burden of proving that the employment practice was, nevertheless, not unlawful is on the defendants. See, *e.g.*, *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (1989) (once plaintiff proves discrimination, employer has burden of proving that it would have taken the same action absent discrimination); *Dothard*, 433 U.S. at 332-337 (once disparate treatment is established, burden is on defendant to demonstrate applicability of the bona fide occupational qualification exception).

In this case, there is no question that Johnson Controls' policy is facially discriminatory. It openly imposes a restriction on women that it does not impose upon men. Once that has been shown, the plaintiff has established far more than a weak prima facie case of disparate treatment of the sort examined in *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973).[6] Instead, the plaintiff has established discrimination based on sex, and it is for the defendant to prove that some reason exists for

[6] When a plaintiff establishes a weak prima facie case under the *Burdine* framework, the defendant need only articulate a legitimate nondiscriminatory reason for its action and the burden remains on the plaintiff to show that the defendant's action was based not on that reason but instead on discriminatory reasons. 450 U.S. at 253. *That* is the framework that should not be regarded as "an inflexible rule." *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 576 (1978). Once there is "smoking gun" evidence (or an acknowledgment) of disparate treatment, the plaintiff need prove no more and the burden of proving any exception or defense is on the defendant.

departing from the usual rule that such discrimination is unlawful.

II. The Bona Fide Occupational Qualification Exception May Apply To A Well-Founded Fetal Protection Policy.

A facially discriminatory employment practice may nevertheless be lawful if "sex * * * is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Section 703(e), 42 U.S.C. § 2000e-2(e). The burden of proving that this "BFOQ" exception applies is on the employer. *Price Waterhouse*, 109 S. Ct. at 1789; *Dothard*, 433 U.S. at 333. In addition to holding that the policy met the requirements of the business necessity defense, the court of appeals held that "Johnson Controls' fetal protection policy could be upheld under the bona fide occupational qualification defense." Pet. App. 42a.[7]

Under the BFOQ defense, the issue in this case is whether the exclusion of women from the battery line, first, is "reasonably necessary" and, second, relates "to the normal operation of" the business of Johnson Controls' battery division. There is little disagreement as to the proof necessary on the first issue. It would not be "reasonably necessary" to exclude *anyone* from the battery line if there were reasonable alternatives to exclusion. If the use of protective devices, reasonable changes in operations, or application of engineering controls would make the battery line safe for all workers, they should be required, notwithstanding the fact (within limits) that

[7] In the district court, Johnson Controls had also argued that the BFOQ defense applied, but because it did not view the company's policy as facially discriminatory, the court did not reach the BFOQ issue. Pet. App. 116a n.5.

they might impose some costs on the employer. It would also not be "reasonably necessary" to treat women differently from men if the objective of the company's policy did not require that discrimination, *i.e.*, if the goal of fetal protection equally required the exclusion of men. Thus the court of appeals, the United States and the Equal Employment Opportunity Commission as *amici curiae*, the petitioners and the respondent essentially agree that the company must prove that there are no reasonable alternatives and that the risk of fetal injury at the lead levels involved is substantially greater or more probable when women are exposed to lead than when men are exposed to lead.

The more contentious legal issue in this case is whether fetal protection relates to the "normal operation" of Johnson Controls' business. Petitioners assert (Br. at 29-33) that the BFOQ defense permits employers to exclude women from jobs only when women are not capable of performing the job duties. Under their theory, even women who are actually pregnant cannot be excluded from the production line or treated differently from men (*e.g.*, required to use respirators or other protective devices) unless they are unable to "produce batteries as efficiently and proficiently as anyone else." *Id.* at 31.

The issue, in petitioners' view, is one of personal autonomy. Although employers must be permitted to decide "what skills employees must possess to perform a particular job," (Pet. Br. at 33), "where the employer's reasons for excluding workers [relate to] *non-job-performance related concerns* * * * there is *no* reason for permitting an employer decision as to what is best for an employee to override the contrary, and personal, decision of the employee whose job rights would be adversely affected by the employer's decision." *Id.* at 34. In their view, the par-

ticular employee alone should be permitted to determine "the appropriate relative balance between [her] employment interests and fetal health concerns * * *." *Id.* at 37-38.

It is at this point that the Institute must respectfully disagree with petitioners. The BFOQ exception is not so narrowly drawn as to preclude consideration of all "non-job-performance related concerns." And, as a matter of federal safety and health policy, there is *every* reason to permit—and even to require—employers to decide what is best for employees and to override their personal decisions as to the appropriate balance between their employment or economic interests and safety concerns. If we are to hold employers accountable for workplace safety and health, we must give them the authority to take such steps as are reasonably necessary to ensure safety and health.

As Judges Posner and Cudahy point out in their dissenting opinions below, and as the United States and EEOC argue as *amici curiae*, there is nothing in the language of the BFOQ exception that limits employers to performance-related concerns.[8] To the contrary, the statute permits an employer to discriminate if "reasonably necessary" for the "normal operation" of the business. And it would be distinctly *abnormal* for an employer to operate its business without taking into account the effects it might have on the health and safety of employees and third parties, including fetuses. As Judge Posner put it, "[i]t is possible to make batteries without considering the possible consequences for people who might be injured

[8] The Pregnancy Discrimination Act did not limit the scope of the BFOQ defense at all. Instead, it made it clear that the defense would apply to pregnancy (and potential pregnancy).

in the manufacturing process, just as it would be possible to make batteries with slave laborers, but neither mode of operation would be normal." Pet. App. 64a.

This Court has recognized that concern for the well-being of others may support application of the BFOQ defense. In *Dothard*, 433 U.S. at 336, the Court held that because employment of women in "contact positions" at male penitentiaries "would pose a real threat * * * to the basic control of the penitentiary and [the] protection of its inmates and other security personnel * * * the District Court was in error in ruling that being male is not a bona fide occupational qualification for the job * * *." If Title VII permits the exclusion of female prison guards to protect the safety of inmates, it should also permit the exclusion of women to protect the health of fetuses. See also *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400 (1985), in which the Court recognized that age (under 60) might be a BFOQ for an airline flight engineer if it were shown that public safety would be impaired by allowing older engineers.

Perhaps the BFOQ exception *could* be read to apply only to situations where being of one sex or the other is reasonably necessary to the performance of job duties, but it *should* be read more broadly to permit consideration of other concerns. If nondiscrimination were the only relevant federal policy, perhaps petitioners' interpretation might have merit. However, nondiscrimination is *not* the only relevant policy. There is also an important federal policy of promoting occupational safety and health. That policy not only favors respondent's interpretation of the BFOQ exception, but it also undermines the philosophical foundation of petitioners' argument.

The Occupational Safety and Health Act ("OSH Act") flatly rejects the notion that employees have the right

to balance their employment/economic interests against their safety and health concerns and to decide on their own, without employer "interference," what risks to take. Opponents of the OSH Act have argued that the market should govern, and that employees should be left free to decide how much workplace safety and health to "buy." See, *e.g.*, W. Viscusi, *Risk By Choice* 156-162 (1983); R. Posner, *Economic Analysis of Law* 311-312 (3d ed. 1986). In their view—like that of petitioners—employees should be permitted to sacrifice their own safety for higher wages by accepting, for example, a higher-paying job at a "dirty" factory over a lower-paying job at a "clean" factory.

But Congress rejected that approach when it adopted the OSH Act. That statute recognizes that there are sound reasons for *not* permitting employees to make these choices on their own. To begin with, employees often lack the technical information and skills necessary to evaluate the risks properly. W. Viscusi, *Risk By Choice* 59-75; D. Nelkin & M. Brown, *Workers At Risk* 149-162 (1984); M. Green & N. Waitzman, *Business War On The Law* 14-16 (1981). Even with complete information, when it comes to evaluating infrequent future hazards, an unrealistic "it won't happen to me" attitude often prevails. D. Nelkin & M. Brown, *supra* at 94-96; M. Green & N. Waitzman, *supra* at 16. It is particularly difficult to accurately balance uncertain future risks against present needs. D. McCaffrey, *OSHA and the Politics of Health Regulation* 46-47 (1982); Sunstein, "Legal Interference with Private Preferences," 53 *Univ. Chi. L. Rev.* 1129, 1164-1169 (1986). And even when workers properly assess the risks to themselves, they may not properly assess externalities and effects on others. W. Viscusi, *Employment Hazards* 94-96 (1979). There are other reasons for preferring federal regulation of workplace safety and health to market forces and "free choice,"[9] but suffice it to say that Congress has decided that, as a matter of federal policy, workers do *not* have the right to decide on their own how much safety they want to "buy."

The OSH Act not only authorizes the Occupational Safety and Health Administration ("OSHA") to promulgate mandatory health and safety standards, but it also requires employers to provide safe workplaces. OSH Act Section 5(a)1; 29 U.S.C. § 654(a)(1). Even if a particular hazard is not covered by an OSHA standard, this "general duty clause" requires employers to follow safe practices.[10] In addition, scores of federal and state statutes and common-law provisions hold employers accountable for the safety of employees, customers, bystanders and others, including fetuses. Surely petitioners and many of their *amici* might join in a lawsuit if a fetus were injured or killed because of the unsafe practices of an employer. In these circumstances, it defies common sense—and federal policy—to argue that the concept of "normal operation" of a business cannot take into account harm that might come to employees or their future children.

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[9] See, generally, R. Posner, *supra* at 311-312; M. Green & N. Waitzman, *supra*, at 8-21, 95-114; N. Ashford, *Crisis In The Workplace* (1976); J. Page & M. O'Brien, *Bitter Wages* (1973).

[10] Moreover, the OSH Act is clearly intended to set only minimum standards for workplace health and safety. We completely disagree with the implication of the amicus brief of the American Public Health Association, *et al.*, that it is somehow inconsistent with the OSH Act and bad policy to permit individual employers to set health and safety standards more stringent that those required by OSHA regulations. The general duty clause and the entire thrust of the OSH Act is to the contrary.

III. The Court Of Appeals Properly Upheld The District Court's Award Of Summary Judgment.

Once it is recognized that a well-founded fetal protection policy *might* come within the bona fide occupational qualification exception, all that is left of this case is to determine whether Johnson Controls' policy was reasonably necessary to achieve its objective. As noted earlier (and as petitioners agree), that requires a determination of whether Johnson Controls demonstrated (1) that there were no reasonable alternatives to its policy and (2) that there was a substantial risk of injury to the fetus caused by lead exposure of women that would not be caused by exposure of men.

In the typical case, the question of alternatives would be critical. The Institute *strongly* believes that if it is reasonably possible to make the workplace safe for *all* employees, both the OSH Act and Title VII require employers to do so. Employers may not simply reduce exposure levels only so far as necessary to protect the least vulnerable sex or group, while excluding the rest. Rather, exposure must be reduced to the *lowest* level reasonably possible. Only if, at that level, the health or safety of a particular group is still impaired may an employer exclude that group.

In this case—under either the district court's business necessity theory or the BFOQ rationale that respondent also asserted in the district court—Johnson Controls had the burden of proving the lack of reasonable alternatives. It offered substantial evidence regarding some measures it tried and others it considered. Pet. App. 3a-12a. In the court of appeals, petitioners did *not* challenge the finding of no reasonable alternatives and (perhaps for that reason) it did not include that issue among the questions it presented to this Court. *Id.* at 37a-38a; Pet. i. Accordingly, this Court should now regard that issue as conclusively resolved in respondent's favor.

The question of whether Johnson Controls has proven that the risk of fetal injury is substantially greater when women are exposed to lead than when men are exposed is somewhat more complex. Once again, the district court (under an erroneous legal theory) held that Johnson Controls had met its burden of proof on this issue. Petitioners *did* challenge that holding in the court of appeals. In affirming the district court's business necessity ruling, the court of appeals held that *petitioners* had the burden of proof on this issue and failed to sustain it. If it had gone no further, we would ordinarily agree with the United States that this Court should reverse the court of appeals' decision and remand for reconsideration of this issue with the burden properly allocated to Johnson Controls. In this case, however, the court of appeals' erroneous allocation of the burden of proof did not seem to be critical to the outcome of this case. That much is evident from the court's characterization of the evidence:

> Because scientific data available as of this date reflects that the risk of harm to unborn children is confined to fertile female employees, the sex-based distinction present in Johnson Controls' fetal protection policy is based upon real physical differences between men and women relating to childbearing capacity and is consistent with Title VII.

Pet. App. 36a.

Moreover, the court of appeals did not stop there. It went on to conclude that Johnson Controls' "policy could also be upheld under the bona fide occupational qualification defense." Pet. App. 42a. The court recognized that the burden of proof under the BFOQ defense was on the com-

pany. *Id.* at 52a. And with that burden in mind, the court repeatedly held that the evidence showed that there is a special risk of fetal harm when women are exposed to lead. Pet. App. 52a-59a. The court expressly held that "there is clear and unrefuted evidence in the record of a substantial and irreversible risk to the unborn child's mental development from lead exposure *in the womb*." *Id.* at 53a (emphasis added). The court also held that Johnson Controls' evidence demonstrated that exposure to lead in the blood at the levels regarded as reasonably safe for adults is *not* reasonably safe for unborn children in the womb. *Id.* at 53a-54a. In the end, the court held that "Johnson Controls has met its burden of establishing that the fetal protection policy is reasonably necessary to industrial safety." *Id.* at 58a-59a.

IV. Federal Safety Policy Requires That In Narrow Circumstances Fetal Protection Policies Be Permitted.

Although we file this brief in support of the respondent, in many respects the National Safe Workplace Institute agrees with petitioners and with the *amicus* brief filed by the United States and the EEOC. The Institute agrees that additional research into workplace reproductive hazards—including hazards to men—is urgently needed. It agrees that much of the present research reflects gender bias, and that researchers are too quick to find hazards to women and too slow to investigate hazards to men.[11] That research bias is certainly grounded in institutional

[11] As we point out at page 20, *infra*, we do *not* believe that the scientific evidence regarding fetal damage from lead exposure is merely the product of bias. The scientific evidence overwhelmingly suggests that exposure to lead at the levels involved in this case has a significant impact on fetal development, but does not jeopardize adult health or safety.

discrimination.. It also agrees that fetal protection policies and other measures supposedly intended to "protect" women, children and families are often either pretexts for intentional discrimination or remnants of paternalistic, discriminatory attitudes that have no place in modern society. We deplore such discriminatory measures and urge the Court to condemn them.[12]

But we depart with petitioners to the extent they imply that the fetal protection policy of *this* employer—Johnson Controls—is discriminatory. The company voluntarily agreed to permanently protect the earnings of all women who were transferred from the battery production line because of the policy. Any notion that it adopted its policy because this is a "male-dominated" company or industry (Pet. Br. 36-37) has no support in the record.[13]

[12] In some respects, the Institute may go beyond the petitioners. We believe that there should be a federal program to compensate women for lost earnings and benefits caused by the application of valid fetal protection policies. We also believe that Congress should enact a family leave act and a comprehensive national health insurance program so that availability of health care is not so closely linked to employment. And we believe OSHA should adopt a regulation to require *all* employers to do what Johnson Controls did: provide alternative employment and protect the wages and benefits of any women who are transferred from jobs because of a valid fetal protection policy.

[13] The argument found in several *amicus* briefs that Johnson Controls' policy assumes that *all* women will become pregnant and carry to term is simply wrong. The policy is based on the fact that *some* women will become pregnant and carry to term and that it is impossible to know which women will do so. Any serious effort by Johnson Controls to determine who is and who is not likely to become pregnant would itself be discriminatory and an intolerable invasion of personal privacy. Cf. *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. at 422-423; *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976) (age may be a BFOQ if it is impractical for an employer to make individualized assessments).

We also cannot condone petitioners' efforts to downplay the tragic effects of lead on fetuses and children and to ignore the biological—as opposed to the "cultural," "mythical" or "stereotypical"—differences between the reproductive functions of women and men. This case—and Johnson Controls' policy—is not about health risks to the reproductive systems of women and men, risks that in some cases may cause sterility or birth defects. Instead, this case is about the health risks to the brain and nervous system of developing children caused by *direct* exposure of the fetus to lead in the blood.[14] The scientific evidence in the record, and the judgment of the experts we have consulted, is that direct fetal exposure to lead presents serious risks of brain damage and functional impairment at blood lead levels well below that thought to be safe for adults.[15] And this direct fetal exposure can occur only in women.

This Court should keep in mind that medical evidence rarely rises to the level of absolute certainty. A few scientists still debate whether smoking can cause cancer and

[14] Of course, the identical legal issue might arise in other industries involving exposure to different risks. Exposure of female health-care employees to rubella and other viruses is an example that comes quickly to mind. See Coleman & Dickinson, "The Risks of Healing: The Hazards of the Nursing Profession," in *Double Exposure: Women's Health Hazards on the Job and at Home* 49 (W. Chavkin, ed., 1984).

[15] In case the Court has not had its fill of citations to medical journals, we add just a few recent articles confirming the effect of lead at relatively low levels on fetal and child development: Needleman & Catsonis, "Low Level Lead Exposure and the IQ of Children," 203 *J. Am. Med. Ass'n* 673 (1990); Shukla, *et al.*, "Fetal and Infant Lead Exposure: Effects on Growth in Stature," 84 *Pediatrics* 604 (1989); Dietrich, *et al.*, "Low Level Fetal Lead Exposure Effect on Neurobehavioral Development in Early Infancy," 80 *Pediatrics* 721 (1987).

whether the HIV virus causes AIDS, for example. It would be very bad health and safety policy to require undisputed scientific proof of a risk before an employer (or OSHA) can act to reduce or eliminate it. If we always wait for scientific certainty, it will always come too late. The question in this case is not whether it is certain or "proven" that fetal exposure to lead causes health problems or that lead exposure of men at similar levels does *not* cause birth defects.[16] The question is whether there is substantial scientific evidence that fetal exposure to lead (in women) causes impairment and that the risk is significantly greater when women are exposed to lead than when men are exposed to lead. The answer to this question is plainly yes.

Given the scientific evidence, the ultimate issue in this case is whether women should be permitted to decide on their own whether to take the risk. The entire philosophy of the OSH Act is that individual workers should *not* be forced to make that choice and do not have the right to agree to unsafe workplaces in return for higher pay, enhanced job security or better benefits. If the OSH Act does not permit women (or men) to make that choice where their own health and safety are concerned, it should not be construed to permit workers (women or men) to make that choice when the health or safety of developing children are concerned. We would make the same argument—and would urge this Court to reach the same conclusion—if this case involved a policy of excluding men from jobs because it was shown that a particular toxin caused changes in sperm which might cause fetal health problems.

[16] Thus, contrary to the brief of the American Public Health Ass'n, *et al.*, at 30 n.28, conclusions *can* be drawn from an absence of evidence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JAMES D. HOLZHAUER
Counsel of Record
DANUTA BEMBENISTA PANICH
Mayer, Brown & Platt
South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Attorneys for Amicus Curiae

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